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JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, COUNTY OF WARREN
IN THE COURT OF COMMON PLEAS

State of Ohio,)	Case No. 17CR033292
Plaintiff,)	Judge Oda
v.)	<u>Motion to Release Grand Jury</u>
)	<u>Testimony for In Camera Review</u>
)	<u>and Motion to Dismiss Indictment</u>
Brooke Skylar Richardson,)	
Defendant.)	

Now comes defendant, Brooke Skylar Richardson, by and through undersigned counsel, and hereby moves this Honorable Court for the following: (1) an Order to release grand jury testimony for an *in camera* inspection pursuant to Crim.R. 6(E); and (2) an Order dismissing the indictment in the above-captioned case, pursuant to Crim.R. 12(C)(1), due to the defects in the institution of prosecution of this case; to-wit: the State's deprivation of Miss Richardson's constitutional rights to a fair trial and due process. A memorandum in support of her motion is attached below; however, counsel intends to file a supplemental memorandum in further support of her motion to dismiss after the *in camera* review of the grand jury testimony.

Respectfully submitted,

RITTGERS & RITTGERS

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MEMORANDUM

I. Motion to Release Grand Jury Testimony for Review

Disclosure of grand jury testimony, other than that of the defendant and co-defendant, is controlled by Crim.R. 6(E). *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982, paragraph one of the syllabus (1981). Crim. R. 6(E) provides, in pertinent part, as follows:

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed *** A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or *when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.*
(emphasis added)

Counsel filed a motion to dismiss indictment, pursuant to Crim.R. 12(C)(1), along with this motion, *supra*. As the Court is aware, counsel's motion to dismiss indictment is based on "matters occurring before the grand jury"; to-wit: that the grand jury indicted Miss Richardson based on evidence that included Dr. Elizabeth Murray's belief, which she has since recanted, that the bones she examined were charred.

Accordingly, counsel respectfully requests that this Court order the release of the grand jury testimony regarding any mention of scientific evidence, Dr. Murray's examination, or Dr. Murray's beliefs based on her examination for *in camera* review by all parties as part of its consideration of the attached motion to dismiss indictment.

II. Motion to Dismiss Indictment

The indictment in this case should be dismissed due to defects in the institution of the prosecution—namely that the State presented material information to the grand jury when seeking to indict Miss Richardson that Dr. Murray has since recanted. While the Ohio Rules of Criminal Procedure do not allow for the equivalent of "a motion for summary judgment on an indictment prior to trial," *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶17, Criminal Rule 12 does permit a court to consider evidence beyond the face of an indictment when ruling on a pretrial motion to dismiss an indictment if the matter is capable of determination without trial of the general issue. *Id.*,

at ¶3; accord *State v. Gaines*, 12th Dist., Clinton Co. App. No. CA2010-07-011, 951 N.E.2d 814, 2011-Ohio-1475, ¶17.

The motion *sub judice* "is capable of determination without trial of the general issue." The motion does not ask this Court to analyze whether the State will be able to prove the elements of the offenses listed in indictment. Rather this motion requires this Court to narrowly determine if the State violated Miss Richardson's right to a fair trial and due process, in violation of Crim.R. 12(C)(1), the United States Constitution, and the Ohio Constitution, by presenting information to the grand jury that the State now knows was based on recanted information. In considering counsel's narrowly defined R. 12(C)(1) motion, Crim.R. 12(F) expressly permits this Court "to consider briefs, affidavits, the proffer of testimony, and other exhibits"; accordingly, this Court can properly consider evidence beyond the face of the indictment in ruling on if the State violated Miss Richardson's rights to a fair trial and due process. *Brady, supra*, at ¶18.

A. "I ain't gonna lie to them, but I sure ain't gonna lie for them!"

The indictment and prosecution in this case are defective because both are based on Dr. Murray's recanted belief that the bones she examined were charred. On July 20, 2017, Dr. Murray, a forensic anthropologist, examined the fetal remains at the Montgomery County Coroner's Office ("MCCO") at request of Dr. Susan Allen at MCCO.

Based on her examination, she informed Dr. Allen, and subsequently the Warren County Prosecutor's Office, that she believed that the bones were charred.

As part of the indictment process, a prosecutor only presents evidence to the grand jury that is impactful. Based on the attached e-mail correspondence between Dr. Murray and Dr. Susan Allen (Exhibit A), Counsel has a good faith reason to believe that the Warren County Prosecutor's Office presented the grand jury with Dr. Murray's belief that the bones she examined in this case were charred. In fact, Dr. Murray and Dr. Allen refer to Dr. Murray's erroneous belief that the bones were charred as "a crucial part of [the Warren County Prosecutor's Office's] game plan." (Exhibit A, pg. 2)

However, Dr. Murray realized that her belief that the bones were charred was incorrect after a second examination of the remains on August 17, 2017—after Miss Richardson had already been indicted. Dr. Murray was adamant that, upon a second examination, the bones examined in this case were not charred. She told Dr. Allen that when it came to the Warren County Prosecutor's office and her decision to recant her original opinion that the bones were burned, "I ain't gonna lie to them, but I sure ain't gonna lie for them!" (Exhibit A, pg. 3)

While the Warren County Prosecutor's Office unintentionally presented false information to the grand jury in this case, the indictment and prosecution are defective all the same and should be dismissed in accordance with Miss Richardson's rights to a fair trial and due process.

III. Conclusion

This motion to dismiss indictment is properly before this Court because the question of whether Miss Richardson's rights to a fair trial and due process were violated is capable of determination without trial of the general issue of whether Miss Richardson is guilty of the five offenses charged in the indictment. However, the grand jury testimony in this case should be released for an *in camera* review by all parties to determine the extent to which the indictment is based on Dr. Murray's, since recanted, belief that the remains were burned so that counsel may fully present argument on his motion to dismiss indictment pursuant to Crim.R. 12(C)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Indictment was sent by electronic mail to Steven Knippen and Julie Kraft, Warren County Prosecutor's Office, on this 31st day of July, 2019.

Charles H. Rittgers
Charles H. Rittgers

-----Original Message-----

From: Murray, Elizabeth [School of Behavioral & Natural Sciences] [mailto:Elizabeth.Murray@msj.edu]

Sent: Wednesday, September 06, 2017 10:52 AM

To: Allen, Susan

Subject: RE: MCCO

Susan, the prosecutor's office seems "upset" with me that I wasn't more definitive about the burning, but you and I saw what we saw -- those bones looked so different from my July visit to my August visit -- and we discussed that. I told them that with microscopy, I might be able to be more definitive, but I wasn't asked to do that, nor was I told of the importance of the burning to their case (in order that I might consider doing it). I told them to contact you and see whether you wanted me to examine those more thoroughly, or whether we should consider sending them to a fellow forensic anthropologist who specializes in burned bone. Apparently my report has definitely upset their apple cart, but it is what it is. I could not say at that second visit with a reasonable degree of certainty that those bones had, in fact, been burned. Could you have said that? I told them that in my opinion, it was somewhat of a "lucky break" that I saw that, thought it, and told Russell -- and that prompted the subsequent search. It is what it is.

Thanks, and I think they will be calling you to find out what you think should be done from here.
Beth

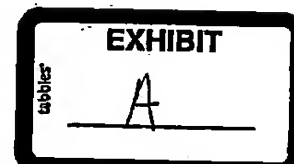
Elizabeth A. Murray, PhD, D-ABFA

Professor of Biology and Forensic/Biological Anthropologist Mount St. Joseph University, 5701 Delhi Road, Cincinnati, OH 45233-1670

Facebook: Dr. Elizabeth Murray, Forensic Anthropologist

Website: <http://faculty.msj.edu/murraye>

Phone 513.244.4948 Fax 513.244.4961



From: Allen, Susan [allens@mcoho.org]
Sent: Wednesday, September 06, 2017 3:00 PM
To: Murray, Elizabeth [School of Behavioral & Natural Sciences]
Subject: RE: MCCO

I also did not realize it was a crucial part of their game plan. If you would like to do this extra step...and they would like for you to do this, it is fine with us. Do you want to ask them if they want that to happen...or would you like for me to talk to Russell about it? They have not called me about any of the findings in your report.

Susan:

-----Original Message-----

From: Murray, Elizabeth [School of Behavioral & Natural Sciences] [mailto:Elizabeth.Murray@msj.edu]
Sent: Wednesday, September 06, 2017 1:54 PM
To: allen, Susan
Subject: RE: MCCO

Susan,

Not histology, but dissecting microscopy. If I'd have realized it was so crucial to their game plan, I would have done it. I have a scope that I can take photos through. I do think that would clarify things, in my mind.

B.

Elizabeth A. Murray, PhD, D-ABFA
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Allen, Susan

From: Murray, Elizabeth [School of Behavioral & Natural Sciences] <Elizabeth.Murray@msj.edu>
Sent: Wednesday, September 06, 2017 4:07PM
To: Allen, Susan
Subject: RE: MCCO

Whatever you think best -- I'm happy to do a second exam and addendum to the report. But if I don't see it, that's what I have to say. Which is why you see that it was my opinion when I talked to you guys that it "appeared" there "may" have been burning. You and I saw how different the bones looked the second exam. I ain't gonna lie to them, but I sure ain't gonna lie for them!

They said they were meeting at 11:00 and then would figure out their next steps. I told them I could do a microscopic exam or recommend someone else to them with far more experience in burned bone. It's their choice. Still, they seem in a hurry for some reason, and my colleague may be months behind in his burned bone consults. I don't know.

I even said to them, whether the bone was burned or not, that baby was still dead, had unexplained skull fractures, and was buried in the back yard. I don't understand why the burning takes it up such a notch. They told me it's all about what she said at one time or another and how her story changed. Well, it's their problem, I guess. I am sorry if I spoke out of turn, but it was my strong feeling the bones were burned in July, and then less so in August -- which is perhaps some basis for always doing a second look, if we only had time! Makes me wonder how many other times my first impressions would have changed a second time around, who knows?

Thanks, Susan,
Beth

Elizabeth A. Murray, PhD, D-ABFA
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